Dissenting Views to
H.R. 1279, "Gang Deterrence and
Community Protection Act of 2005"

We strongly dissent from H.R. 1279. The legislation would federalize a host of crimes currently and competently handled by the states and the District of Columbia; penalize even non-violent drug dealing and some misdemeanors as crimes of violence; expand without reason the definition of criminal street gang; unwisely leave to the sole discretion of the government the unreviewable decision to try juveniles as adults; impose unduly harsh and discriminatory mandatory minimum sentences; and expand the use of the federal death penalty to new offenses. The legislation is unnecessary as federal prosecutors are already armed with the Continuing Criminal Enterprise ("CCE") and Racketeer Influenced and Corrupt Organizations Act ("RICO") statutes to combat gang crimes. The legislation also may be unconstitutional. Recent Supreme Court opinions strongly suggest that this legislation would exceed Congress' authority under the Commerce Clause.

H.R.1279, the "Gang Deterrence and Community Protection Act of 2005" ("Gang Deterrence Act") has a deceptive title since its primary purpose is to punish more young people as adults to the extent possible.[1] The bill would largely federalize the prosecution of criminal street gang members and facilitate the federal prosecution of juvenile members. Research shows young people who are prosecuted as adults are more likely to commit a greater number of crimes upon release than youth who go to the juvenile justice system. Therefore locking young people up in adult prisons actually compromises public safety. Moreover, research demonstrates that increasing prison terms does not reduce youth violence. H.R. 1279 also authorizes substantial appropriations for law enforcement teams and technology, while providing nothing in the way of jobs or education for at-risk youth.

Description of Legislation

H.R. 1279 has several substantive provisions. Title I of the bill creates new offenses, broadens existing ones, increases existing maximum penalties, imposes twenty-four new mandatory minimum sentences, and authorizes the death penalty for a number of offenses. Section 101 of Title I creates new penalties with mandatory minimum sentences for committing gang crimes. The term "gang crime" is defined in the bill to include violent and non-violent State and Federal crimes, including what are misdemeanors in some states.[2] The number and nature of "gang crimes" would be vastly expanded by Section 112, which would include garden variety state offenses, like resisting arrest, into the definition of "crime of violence."[3] The new

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[1]The Supreme Court recently struck down the death penalty for juveniles in Roper v. Simmons, 125 S. Ct. 1183 (2005).

[2]A "gang crime" is defined to mean any federal or state crime punishable by more than 1 year in prison and includes among others: crime of violence, obstruction of justice, drug trafficking, money laundering, identification fraud, and car and property theft.

[3]The term "crime of violence" appears in Title 18 over 100 times. As far as we are aware, the sponsors of this legislation have not evaluated the effects this change in definition would have beyond this legislation.

penalties, with mandatory minimum sentences and death penalties, for committing a gang crime depends on the seriousness of the offense as follows: (a) death or life imprisonment for any crime resulting in death; (b) a mandatory minimum of 30 years to life for kidnaping, aggravated sexual abuse or maiming; (c) a mandatory minimum of 20 years to life for assault resulting in serious bodily injury; or (d) a mandatory minimum of 10 years to life in any other case.

The legislation has numerous other provisions that enhance existing criminal penalties and apply them to existing offenses and much less serious conduct.

- Section 102 creates new mandatory minimums for the crime of interstate and foreign travel or transportation in aid of racketeering. Section 102 creates a new mandatory minimum of 5 years and increases the maximum sentence from 5 to 20 years for intending to distribute the proceeds of or to commit unlawful activity. It also creates a new mandatory minimum of 10 years for the intent to commit a crime of violence in furtherance of unlawful activity and increases the maximum from 20 to 30 years. Finally, the Section creates a new death penalty if death occurs (original life imprisonment).

- Section 103 increases the maximum for: car jacking from 15 to 20 years and creates a new mandatory minimum of 10 years; illegal gun transfers to drug traffickers or violent criminals from 10 to 20 years and creates a new mandatory minimum of 5 years; conspiracy to defraud the United States from 5 to 20 years.[4]

- Section 104 provides for increased penalties for use of interstate commerce facilities in the commission of murder-for-hire and "other felony crimes of violence." Specifically, Section 104 creates the following new penalties with new mandatory minimums and death penalties for the crime: death or life in prison if the crime of violence results in death; 30 to life for kidnaping, aggravated sexual abuse, or maiming; 20 to life for assault with serious bodily injury; and 10 to life for all other cases.[5]

- Section 105 provides for the following increased penalties for violent crimes in aid of racketeering activity: 30 to life for kidnaping, aggravated sexual abuse, or maiming (original 30 max for maiming; life for kidnaping); 20 to life for assault with serious bodily injury (original 20 max); 10 to life for all other crimes.[6]

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[4]Section 103 would eliminate from the carjacking statute, 18 U.S.C. § 2119, the state of mind element, "intent to cause death or serious bodily harm" and would broaden the offense described in 18 U.S.C. § 924(h), to include transfers of firearms knowing that they will be "possessed" in furtherance of a "crime of violence" or drug trafficking crime.

[5]Section 104 would amend 18 U.S.C. § 1958, which currently prohibits travel or use of the mails or other interstate facility with intent that a murder be committed, by adding "with intent that [any] other crime of violence" be committed. Under Section 112, this would include non-violent drug offenses, and state offenses that are misdemeanors under the law of some states.

[6]Section 105 would fundamentally change the nature of the offense under 18 U.S.C. § 1959 to prohibit less serious conduct, while changing the penalty structure to one of consecutive mandatory minimum sentences. It would prohibit less serious conduct in at least three ways. First, it replaces a "crime of violence *against any individual*" with the revised definition of "crime of violence," which

- Section 114 increases the penalties including mandatory minimums for the use or discharge of a firearm in a crime of violence or drug trafficking crime.[7] The Section increases the existing mandatory minimum consecutive penalty for possession from 5 to 7 years. In addition, Section 114 increases the penalty for discharging from 10 to 15 years and creates a new penalty for wounding, injuring, or maiming at 20 years.

In addition to adding and enhancing penalties for existing and less serious conduct, H.R. 1279 creates the following new offenses:

- Section 106 creates a new criminal offense for violent acts committed during and in relation to a drug trafficking crime, with the following penalties: death penalty or life for the death of any person; 30 to life for kidnaping, aggravated sexual abuse, or maiming; 20 to life for assault with serious bodily injury; and 10 to life for all other cases.[8]

- Section 107 creates a new criminal offense involving interstate or foreign commerce or the mail with the intent that 2 or more murders be committed, with the following penalties: death penalty or life if a death occurs; 20 to life for assault with serious bodily injury; and 10 to life for all other cases.[9]

Section 110 would expand venue in capital cases so as to allow prosecutors to forum shop among jurisdictions where any part of the crime was committed. That is, Section 110 amends jurisdiction of cases punishable by death to include not only the district where the offense was

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includes state misdemeanors and minor federal felonies that merely involve a substantial risk that force may be used against the person *or property* of another, and entirely non-violent drug crimes. Second, it replaces the requirement that the underlying offense be in "consideration for the receipt [or] promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity" with a requirement that the underlying offense be merely "to further the activities of the enterprise." Third, it subjects to the death penalty any offense that "results in death," rather than only "murder."

[7]Section 114 amends subsection A of Section 924(c)(1)(A) of title 18 to include conspiracy; if someone conspires to commit a crime of violence or drug trafficking crime and a firearm is involved, the defendant will receive a mandatory consecutive sentence each time the weapon is used, carried, or possessed.

[8]More specifically, Section 106 would add to the Controlled Substances Act a new offense, prohibiting the commission, conspiracy or attempt to commit a "crime of violence during and in relation to a drug trafficking crime." Under the new definition of "crime of violence," this would include offenses that are misdemeanors under the law of some states and non-violent drug trafficking crimes -- during and in relation to a drug trafficking crime.

[9]Section 107 would create a new federal crime without a criminal act. Unlike the Travel Act as currently written, which requires travel or use of the mails or other facility in interstate or foreign commerce *and* one of several inherently illegal acts, this statute merely prohibits travel or use of the mails or other facility in interstate or foreign commerce "with intent that 2 or more intentional homicides be committed."

committed, but any district involved in the entire timeline of the offense, from conception to completion.[10]

A section of particular significance in H.R. 1279 is Section 115. This section authorizes the Attorney General for the first time to charge as an adult in federal court a juvenile who is 16 or older and commits a crime of violence.[11] This Section prohibits judicial review of the Attorney General's decision to transfer juveniles.

Title II authorizes various appropriations. Section 201 of the bill requires the Attorney General, after consultation with the Governors of appropriate states, to designate certain locations as "high intensity interstate gang activity areas," and provides assistance in the form of criminal street gang enforcement teams consisting of numerous federal agencies, and state and local law enforcement authorities to investigate and prosecute criminal street gangs in each high intensity interstate gang activity area. It authorizes $5,750,000 for each fiscal year from 2006 through 2010 for this purpose. Section 202 authorizes $20,000,000 for each fiscal year from 2006 through 2010 for independent state and local efforts.[12]

Among the organizations that have opposed, or have expressed serious concerns with H.R. 1279 are:

(1) Judicial Conference of the United States;[13]

(2) Child advocacy groups including: Alliance for Children and Families; American Academy of Child & Adolescent Psychiatry; Campaign 4 Youth Justice; Child Welfare League of America; Children and Adults with Attention-Deficit/Hyperactivity Disorder (CHADD); Children's Defense Fund; Coalition for Juvenile Justice; Council of Juvenile Correctional Administrators; Federation of Families for Children's Mental Health Girls Incorporated; Juvenile Law Center; National Association of School Psychologists; National Collaboration for Youth; National Juvenile Defender Center; National Network for Youth; Society for Research in Child

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[10]The Section creates a new subsection allowing jurisdiction to fall in a district where related conduct occurred if the offense affects interstate or foreign commerce, or involves the importation of a person or object into the U.S.

[11]Any promotion of this approach by the Department of Justice (DOJ) makes no sense and has no credible foundation in light of the advice and counsel DOJ provides to state and local authorities on how to address youth violence, including youth gang violence. The DOJ website and the annual report for the Office of Justice Programs, promotes just the opposite approaches, recommending the appropriate evidence based crime prevention and crime response approaches for youth from age 2 to age 22, including responses to serious violent crimes. Nowhere in the DOJ protocols is there a call for mandatory minimum sentences or treating juveniles as adults as an evidenced-based response.

[12] No funds would be authorized for education, job training, or drug treatment.

[13]*See* Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States to the Honorable Howard Coble, dated April 1, 2005.

Development; and the Youth Law Center;[14]

(3) Criminal justice groups including: American Civil Liberties Union; American Correctional Association; Federal Public Defender; and the National Association of Criminal Defense Lawyers;[15]

(4) Industry and business-oriented groups including: Chamber of Commerce of the United States, the National Federation of Independent Business, and Business Civil Liberties, Inc;[16] and

(5) Religious, human rights and civil rights organizations including: Church Women United; Democracy Project; Justice Policy Institute; Legal Action Center; Mennonite Central Committee; Catholic Charities USA; National Alliance for the Mentally Ill (NAMI); National Council of La Raza; National H.I.R.E. Network; National Mental Health Association; Physicians for Human Rights; Presbyterian Church (USA) Washington Office; School Social Work Association of America; United Church Of Christ; Volunteers of America; and Women of Reform Judaism.[17]

For these and the following reasons, we dissent from H.R. 1279.

I. The Transfer Provision Endangers Youth and Public Safety

Permitting the government unreviewable discretion to transfer juveniles to be tried as adults will not decrease crime among youth. Study after study have shown that such measures merely increase prison rape and assaults against youngsters incarcerated in adult prisons, disproportionately affect minority youth, and increase recidivism rates of released youthful offenders.

First, research conclusively demonstrates that prosecuting young people as adults does not reduce youth crime; it in fact increases crime, including violent crime.[18] Numerous studies including those conducted by the Coalition for Juvenile Justice, the National Institute of Justice (U.S. Department of Justice), and the Florida Department of Juvenile Justice conclude that youth transferred to adult court and tried as adults are more likely to: (a) commit a greater number of crimes upon release; (b) commit violent crimes upon release; and (c) commit crimes sooner upon

[14] *See* Letter addressed to Chairman Sensenbrenner and Representative Conyers dated April 8, 2005.

[15] *See* Letter to Representatives Coble and Scott dated April 4, 2005; *see also* Letter addressed to Chairman Sensenbrenner and Representative Conyers dated April 8, 2005; Letter from Thomas W. Hiller II, Federal Public Defender to Chairman Sensenbrenner and Representative Conyers dated April 21, 2005.

[16] *See* Letter from Business Civil Liberties, Inc., Chamber of Commerce of the United States and National Federation of Independent Business to Representatives Coble and Scott dated April 5, 2005.

[17] *See* Letter to Representatives Coble and Scott dated April 4, 2005; *see also* Letter addressed to Chairman Sensenbrenner and Representative Conyers dated April 8, 2005.

[18] Representative Scott offered an amendment ordering the Director of the Office of Justice Programs to carry out a study of evidence-based approaches that have proven to prevent crime. Prosecuting young people as adults does not reduce youth crime and it is necessary for an agency to further examine this point and to determine the mechanisms that do in fact reduce crime. However, this amendment was defeated.

release.[19] A Miami Herald study of the Florida experience in 2001 concluded that "[s]ending a juvenile to prison increased by 35 percent the odds he'll re-offend within a year of release."[20] Thus, locking youth in adult prisons actually compromises public safety.

Second, juveniles incarcerated in adult prisons are also at greater risk of sexual and physical assaults. Studies demonstrate that such youth are five times as likely to report being a victim of rape, twice as likely to be beaten by staff, and 50% more likely to be assaulted with a weapon than youth in juvenile facilities, and are eight times more likely to commit suicide.[21] Moreover, policies that increase the transfer of juveniles to adult court also have a disproportionate impact on children of color. Recent studies demonstrate that eight out of every ten youth admitted to adult facilities across the country were youth of color, and minority youth are more likely to be treated as adults than white youth charged with the same offenses.[22]

Third, H.R. 1279 inexcusably removes judicial review of a prosecutor's decision to try a youth as an adult.[23] Current law requires an in-depth review of multiple considerations by a federal judge of whether such a transfer is in the interest of justice. This policy is unwise and will increase federal prosecution of youth for minor offenses. Presently, in both federal and state courts, juveniles who commit the *most* serious violent crimes are almost certain to be transferred to adult court through use of a judicial waiver. In effecting transfer to adult court, judicial waivers, as opposed to legislative or prosecutorial waivers, are the most common type of waiver device used. That is, the juvenile court judge decides whether or not to waive jurisdiction to adult court. However, Section 115 of H.R. 1279 takes the waiver decision out of the judge's

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[19] *See e.g.* Lanza-Kaduce, Lonn, Charles E. Frazier, Jodi Lane & Donna Bishop, JUVENILE TRANSFERS TO CRIMINAL COURT STUDY: FINAL REPORT (Florida Department of Juvenile Justice, Office of Juvenile Justice and Deliquency Prevention (2002); Green, Ronnie & Geoff Dougherty, "Kids in Prison: Tried as Adults, They Find Trouble Instead of Rehabilitation," *Miami Herald*, March 18, 2001; Fagan, Jeffrey, THE COMPARATIVE IMPACTS OF JUVENILE AND CRIMINAL COURT SANCTIONS ON ADOLESCENT FELONY OFFENDERS (National Institute of Justice, U.S. Department of Justice) (1991); Mayers, David L., ADULT CRIME, ADULT TIME; PUNISHING VIOLENT YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM (Sage Publications, 2003); Podkopacz, Marcy R. & Barry Feld, "The End of the Line: An Empirical Study of Judicial Waiver," 86 *Journal of Criminal Law & Criminology* 449 (1996); Coalition for Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Courts (2005).*

[20] Green, Ronnie & Geoff Dougherty, "Kids in Prison: Tried as Adults, They Find Trouble Instead of Rehabilitation," *Miami Herald*, March 18, 2001.

[21] *See e.g.* Audi, Tamara, "Prison at 14: Teenage Girls Serve Time with Adult Inmates," *Detroit Free Press*, July 10, 2000; Forst, Martin, Jeffrey Fagan & T. Scott Vivona, "Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy," 40 *Juvenile & Family Court Journal* (1989).

[22] *See e.g.* Poe-Yamagata, E., AND JUSTICE FOR SOME (National Council on Crime and Delinquency, 2000); *see also* The Coalition for Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court (*revealing that over 250,000 youth are charged as adults every year and roughly 82% of youths tried as adults are youth of color).

[23] In fact, the bill provides no exception to non-reviewability for jurisdictional issues such as non-age--a fifteen-year-old mistakenly identified as being older--or for young people who may not be competent to stand trial as an adult, a high risk scenario as many youth who engage in risky behaviors have mental health problems.

discretion.[24] As the Judicial Conference of the United States points out, Section 115 "could result in the federal prosecution of juveniles for myriad offenses . . ."[25] Equally alarming, the legislation removes the current prerequisite that the transferred child have a prior conviction for an offense, that would be a serious violent felony if committed by an adult. Thus, a prosecutor could unilaterally decide to transfer a youthful offender with no prior criminal record who commits a simple drug trafficking offense, with no judicial review of whether such transfer serves the interests of justice. Moreover, a move toward federal prosecution causes us great concern because as the Judicial Conference acknowledges, "juvenile offenders require different and perhaps more extensive correctional and rehabilitative programs than adults and . . there is not a single, federal correctional facility to meet these needs."

H.R. 1279 simply takes the wrong approach. Instead of focusing on correctional and rehabilitative programs, it attempts to throw more youth in crowed adult prisons where these programs are lacking.[26] H.R. 1279 reflects the politics of crime where you come up with a good slogan such as "the gang busters" bill and codify it. Until H.R. 1279, the Judiciary Committee had made great progress toward putting aside the politics of crime in favor of sound policy in the area of juvenile justice.

The last three Chairmen of the Subcommittee on Crime and the last two Chairmen of the Subcommittee on Children Youth and Families of the Education and Workforce Committee, worked on a bi-partisan basis with Ranking Member Scott, a member of both subcommittees, to coauthor juvenile crime prevention and intervention bills in both subcommittees which all the members of both, respectively, cosponsored. These bills were based on the advice of juvenile judges, administrators, researchers, advocates and even law enforcement officials representing the entire political spectrum. We held hearings where a number of witnesses were called by the majority and a number by the minority. They all said the same thing: the best way to prevent juvenile crime, and ultimately, adult crime, is through prevention and early intervention programs geared toward at-risk youth.

Moreover, following the Columbine school shooting incident, the Speaker of the House and the Minority Leader appointed a bi-partisan task force on youth crime consisting of 12 Republicans and 12 Democrats. We met for six weeks with each member having the right to call witnesses to tell us how to address youth crime and violence. They all said the same thing: through prevention and early intervention and treatment, or graduated sanctions, programs run by local law enforcement, private community based organizations and court personnel. Not one said through treating more kids as adults or through mandatory minimum sentences. The two bipartisan bills incorporated this advice and passed both the House and the Senate virtually unanimously. Unfortunately, these universally agreed upon crime prevention and early

[24]Since juveniles can already be tried as adults for serious violent crimes, the only purpose of this legislation is to try more youth as adults for less serious crimes. Moreover, the legislation also allows any other offenses committed that are not covered by the bill to be tried as adult offenses, including lesser included offenses, thus putting some perhaps trivial charges in federal district courts as well.

[25]Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States to the Honorable Howard Coble, dated April 1, 2005.

[26]The adult prison system is approaching full capacity. For example, the nation's prisons and jails held 2.1 million people in mid-2004, 2.3 percent more than the year before. *See* "*Nation's Inmate Population Increased 2.3 Percent Last Year*," The New York Times, 4/25/05.

intervention approaches were never funded at their modest authorization levels, and even worse, have been cut by more than one half compared to what the funding levels were for prevention and intervention programs when the bills were initially passed.

While there is no question that violent and dangerous youth need to be securely confined for our safety and theirs, incarcerating youth with more sophisticated adult prisoners renders them vulnerable to attack and more damaged when they return to society. This is tantamount to giving up on them–something we should never do. Recent data show a stark reduction in the rate and seriousness of juvenile delinquency in the past nine or ten years. Indeed, as we have learned more from the developmental and brain research in recent years, we know that rehabilitative programs work better in turning around these young lives and correcting their behavior.[27]

In our view, another preferable approach to youth crime would be to emphasize effective correctional and rehabilitative programs such as Head Start and Job Corps. Job Corps programs deter crime: about 75% of Job Corps participants move on to a job or full-time study; they earn about 15% more than those who do not participate in the program; and, not surprisingly, Job Corps participants are about one-third less likely to be arrested than non-participants. As the Head Start program demonstrates, early childhood education and job training programs not only reduce crime, they save money. Studies of the Head Start program, for example, estimate that about $3 is saved for every $1 spent on the program by reducing future costs of remedial education, welfare, and crime. Moreover, research demonstrates the effectiveness of focused family interventions such as:

- ***Multi-Systemic Therapy (MST)*** -- Chronic juvenile offenders who graduated from intensive family multisystemic therapy (MST) were one-third as likely to be re-arrested within four years (22%) as the graduates of individual therapy (71%);

- ***Functional Family Therapy*** **--** Youths whose families received family therapy (FFT) were half as likely to be re-arrested as the youths whose families did not receive family therapy (26 percent vs. 50 percent); and

- ***Multidimensional Treatment Foster Care*** **–** The boys randomly assigned to treatment foster care averaged half as many new arrests as the boys placed in group-homes (2.6 arrests vs. 5.4 arrests). And six times as many boys in treatment foster care as boys in the group homes had successfully avoided any new arrests (41 percent vs. 7 percent).

II. Legislation Imposes Ineffective and Discriminatory Mandatory Minimums

[27] A report released last year by Fight Crime: Invest in Kids, a law enforcement-based group, points to the effectiveness of many current programs in preventing gangs–at the local and state level–and in interdicting violent gang activity. That report, CAUGHT IN THE CROSSFIRE: ARRESTING GANG VIOLENCE BY INVESTING IN KIDS, offers much useful advice about programs that work with the help of federal investment in anti-gang programs through the JJDPA and other entities.

H.R. 1279's heavy reliance on mandatory minimums is a flawed approach because mandatory minimums distort the sentencing process, discriminate against minorities in their application, and waste money.[28]

Mandatory minimum penalties have been studied extensively. The Judicial Conference of the United States and the U.S. Sentencing Commission have found that mandatory minimums distort the sentencing process and have the "opposite of their intended effect."[29] Mandatory minimums "destroy honesty in sentencing by encouraging charge and fact plea bargains." Moreover, mandatory minimums result in unwarranted sentencing disparity. That is, "mandatory minimums .... treat dissimilar offenders in a similar manner, although those offenders can be quite different with respect to the seriousness of their conduct or their danger to society..." and... "require the sentencing court to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment."[30]

In addition, mandatory minimums tend to discriminate against minorities. Both the Judicial Center in its study report entitled ``The General Effects of Mandatory Minimum Prison Terms: a Longitudinal Study of Federal Sentences Imposed" and the United States Sentencing Commission in its study entitled ``Mandatory Minimum Penalties in the Federal Criminal Justice System" found that minorities were substantially more likely than whites under comparable circumstances to receive mandatory minimum sentences. The Sentencing Commission study also reflected that mandatory minimum sentences increased the disparity in sentencing of like offenders with no evidence that mandatory minimum sentences had any more crime-reduction impact than discretionary sentences.

Finally, mandatory minimums are extremely costly because they keep minor role offenders locked up longer than necessary while the worst offenders get no more time than they would have received under a discretionary sentencing system.[31] In response to an inquiry by Ranking Member Scott's office, the U.S. Sentencing Commission estimated the potential prison impact of H.R. 1279 to require an additional 23,600 prison beds over the next 10 years. At

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[28]H.R. 1279 misdirects its attention to mandatory minimums and enhanced penalties instead of addressing the real need to prevent gang members from obtaining guns. In this regard, Representatives Conyers and Van Hollen offered an amendment to close a current loophole that exists in the federal gun laws. The amendment would have made it illegal to transfer a firearm to anyone that the Federal Government has designated as a suspected or known gang member or terrorist. Unfortunately, the amendment was defeated.

[29]*See* U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).

[30] Ibid.

[31]The cost issue was born out dramatically in a Rand Commission study report entitled "Mandatory Drug Sentences: Throwing Away the Key or the Taxpayers Money?" The study showed that mandatory minimum sentences were far less effective than either discretionary sentences or drug treatment in reducing drug-related crime and, thus, far more costly than either. For example, the study found that the results of spending a million dollars to impose federal mandatory minimum sentences for those arrested for drug dealing would reduce cocaine use by almost 13 kilograms. If, however, the money was used to arrest, confiscate the assets of, prosecute, and incarcerate dealers with prison terms under conventional sentencing schemes where judges could determine the sentences based on the seriousness of the offense and the offender's background, more offenders could be incarcerated and cocaine consumption would be reduced by over 27 kilograms.

$75,000 per cell, that amounts to prison construction costs of almost $2 billion. At a cost of $30,000 per inmate for annual upkeep, that amounts to an additional $700 million per year and over $7 billion dollars over a ten-year period. That is an additional $9 billion over and above the billions of dollars per year resulting from Congress' seemingly insatiable penchant for mandatory minimum sentences, with far less crime reduction value than much cheaper, proven approaches.

III. The Legislation Unjustifiably Expands the Federal Death Penalty

H.R. 1279 would create new death penalty provisions at a time when evidence continues to expose the fallibility of the system and its discriminatory effects.[32]

H.R. 1279 authorizes the death penalty for numerous offenses if "death results" in six different sections.[33] Numerous studies, including those conducted by the ACLU and the University of Michigan among others, have documented the exposure of innocent individuals to death penalty system.[34] Last year, a University of Michigan study identified 199 murder exonerations since 1989, 73 of them in capital cases. The same study found that death row inmates represent a quarter of 1 percent of the prison population but 22 percent of the exonerated. Since 1973, 119 innocent people have been released from death row. An earlier study found that more than two out of every three capital judgments reviewed by the courts during a 23-year period were seriously flawed. Moreover, experts reviewed all the capital cases and appeals imposed in the United States between 1973 and 1995 at the state and federal levels. They found a national error rate of 68%. In other words, over two-thirds of all capital convictions and sentences are reversed because of serious error during trial or sentencing. This does not include errors that were not serious enough to warrant a reversal.[35]

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[32]Representative Scott offered an amendment that would have deleted the death penalty from H.R. 1279. Numerous studies have pointed to a high number of wrongful convictions under the death penalty and to the racial and geographical disparities associated with the death penalty. The amendment was rejected. Another amendment offered by Representative Scott would have required a showing of an "intentional" death before a gang member was exposed to the death penalty. The amendment would have prevented a gang member from going to jail for life for an accidental death, but the amendment was rejected.

[33]*See* Sections 101 (gang crime resulting in death), 102 ("crime of violence" "to further" unlawful activity if death results), 104 (travel or use of interstate facilities with intent that "crime of violence" be committed if results in death), 105 (death for "crime of violence" if results in death), 106 ("crime of violence during and in relation to a drug trafficking crime" if results in death), and 107 (intent that 2 or more homicides be committed if results in death).

[34]*See* American Bar Association, "Gideon's Broken Promise: America's Continuing Quest for Equal Justice" (2005) (demonstrating that innocent people are wrongfully convicted in our criminal justice system due to the lack of effective defense representation for the poor). In fact, Governor Ryan of Illinois declared a moratorium in his state after 13 people were released from death row because of innocence. Ryan wanted assurances that the system was working before resuming executions. Some death penalty proponents have argued that the problems in Illinois are exceptional. In fact, however the error rate in Illinois is 66%, slightly lower than the national average of 68%.

[35]*See* "A Broken System: Error Rates in Capital Cases", 1973-1995 (Retrieved April 26, 2005 from http:// justice.policy.net/jpreport/).

In fact, due in part to the high number of wrongful convictions with respect to the death penalty, Congress passed the Justice for All Act of 2004,[36] which received strong bipartisan support. The Act increases federal resources available to state and local governments to combat crimes with DNA technology, and provides safeguards to prevent wrongful convictions and executions. Title III of the bill, the Innocence Protection Act, provides access to post-conviction DNA testing in federal cases, helps States improve the quality of legal representation in capital cases, and increases compensation in Federal cases of wrongful conviction. By increasing the number of federal death penalty provisions, H.R. 1279 runs counter to the spirit of the Innocence Protection Act and would actually prevent the IPA from achieving its full purpose. Even worse, these new death penalties are being proposed at a time when the Innocence Protection Act has not even been funded.

Furthermore, the death penalty has been shown to be racially and economically discriminatory.[37] Studies which examine the relationship between race and the death penalty have now been conducted in every active death penalty state. In 96% of these reviews, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both. After its careful study of the death penalty in the United States, the United Nations' Human Rights Commission in 1998 issued a report which rightly concludes: "Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death."[38]

Finally, Section 110 of H.R. 1279 would expand venue in capital cases, to make any location even tangentially related to the crime a possible site for the trial. This change in law will increase the inequities that already exist in the federal death penalty system, giving prosecutors tremendous discretion to "forum shop" for the most death-friendly jurisdiction in which to try their case. The bill would allow the government to bring the death penalty to states whose citizens have rejected it, even if the offense was not committed there. It would violate both the defendant's rights and states' rights to accept or reject capital punishment.

Article III of the Constitution requires that the "[t]rial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."[39] This is reinforced by the Sixth Amendment, which guarantees the accused a trial "by an impartial jury of the Sate and district wherein the crime shall have been committed.; which district shall have been previously

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[36] Pub.L.No. 108-405, s. 401-432 (2004).

[37] *See* Department of Justice Report, "The Federal Death Penalty System: A Statistical Survey" (1988-2000) (finding numerous racial and geographic disparities in the death penalty and revealing that 80% of the cases submitted by federal prosecutors for death penalty review in the past five years have involved racial minorities as defendants); *see also* University of Maryland Report, "An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction" (concluding that defendants are much more likely to be sentenced to death if they have killed a caucasian).

[38] Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Mission to the United States of America, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 10, P 62, U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

[39] U.S. Const. Art. III, § 2, cl.3.

ascertained by law."[40] Venue is constitutional only in the district where the acts constituting the charged offense were committed, not in any district where activities involved in the "offense , or related conduct . . . occurred."[41]

IV. Legislation is Not Necessary

H.R. 1279 is simply not needed because federal prosecutors are already armed with the RICO and CCE statutes to prosecute actual gang crimes. In spite of its name and origin, RICO is not limited to "mobsters" or members of "organized crime" as those terms are popularly understood. Rather it covers those activities which Congress felt characterized the conduct of organized crime no matter who actually engages in them. In fact, courts have frequently upheld prosecutions under RICO for criminal gang activity.[42]

Gangs were being prosecuted under RICO as early as the mid-1980s and by the early 1990s, the CCE statue was also being used against gangs engaged in drug trafficking.[43] As one recent commentator noted, "there is a national trend in fighting gang-related crime using the RICO statutes, and these efforts have been very successful . . . RICO may be used to target the managing forces of the gang, as well as its underlings."[44] Thus, if the point of the bill is to provide a greater role for federal law enforcement to combat gang violence, such a role already exists.

V. The Legislation is a Questionable Exercise of the Commerce Clause Power

H.R. 1279 is so intrusive that if enacted into law, it may well be found inconsistent with recent Supreme Court decisions interpreting the Congressional power to legislate under the Commerce Clause. The Commerce Clause of the U.S. Constitution provides that Congress shall have the power to regulate interstate and foreign commerce.[45] H.R. 1279 violates the Commerce Clause because it "completely obliterate[s] the Constitution's distinction between national and local authority."[46] The legislation unconstitutionally reaches "gang activity" which does not have the requisite "substantial affect" on commerce.[47]

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[40] U.S. Const. Amend. VI.

[41] *See* United States v. Cabrales, 524 U.S. 1, 6-10 (1998) (venue for money laundering offenses was in the district where the money was laundered, not in the district where the money was illegally produced); United States v. Salinas, 373 F.3d 161, 163-170 (1st Cir. 2004) (venue for passport fraud was in the district where the defendant made the knowingly false statement, not where the application was processed).

[42] *See* United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) (affirming RICO conviction of members of the Westies gang); see also United States v. Espinoza, 52 Fed. Appx. 846 (7th Cir. 2003) (affirming RICO conviction of member of QC Bishops street gang).

[43] David R. Truman, The Jets And Sharks Are Dead: State Statutory Responses To Criminal Street Gangs, 73 Wash. U. L.Q. 683 (1995).

[44] Janice A. Petrella, Equal Protection–What Is In A Name? Sign? Symbol? Gang Members and RICO Considered, 34 Rutgers L.J. 1237 (2003).

[45] *See* U.S. Constitution, Art. I, s.8, cl. 3.

[46] U.S. v. Morrison, 529 U.S. 598 (2000).

[47] U.S. v. Lopez, 514 U.S. 549 (1995).

Five years ago in *United States v. Morrison*, the Court invalidated portions of the Violence Against Women Act, stating that Congress had overstepped its specific constitutional power to regulate interstate commerce.[48] Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority in order to, "completely obliterate the Constitution's distinction between national and local authority." The same concerns were brought in *United States v. Lopez*, which invalidated a federal law criminalizing the possession of firearms in a school zone. In that case, the Supreme Court cautioned Congress regarding its limited authority in matters traditionally left to the states, Congress's authority is not as broad.[49] This would be particularly true concerning H.R. 1279 which makes federal crimes of a host of traditional state offenses.

In both *Lopez* and *Morrison*, the Supreme Court also held that federal statutes that attempt to regulate intrastate activities are unconstitutional unless the conduct "substantially affects" commerce. For H.R. 1279 to avoid a constitutional problem under these cases would require that the criminal street gang itself be an economic enterprise, or at least that its activities "substantially" affect commerce. The effect of the new street gang offenses proposed by H.R. 1279 on interstate commerce is, like violence against women and gun possession in a school zone, too attenuated. Otherwise, virtually all local activity that could be characterized as "gang activity" would be federalized, upsetting the federal-state balance in criminal prosecution. The effect of gang activities would unlikely meet the "substantially affected " threshold under the Supreme Court rulings.

Conclusion

While there is no question that violent and dangerous youth need to be securely confined for our safety and theirs, the emphasis of H.R. 1279 on the death penalty and mandatory minimums is misplaced. Mandatory minimum sentences have been studied extensively and have been proven to be ineffective in preventing crime; proven to distort the sentencing process; and proven to be a considerable waste of taxpayers money. Moreover, the death penalty system has numerous deficiencies, not to mention its discriminatory effects. The bill also unwisely advocates for transferring a greater number of juveniles to adult court to be tried for youth-related crimes. This runs contrary to research which indicates that prosecuting young people as adults does not reduce youth crime. In fact, it's been proven to have the opposite effect.

In the alternative, we should emphasize prevention programs which discourage youth from joining gangs. Research indicates the effectiveness of focused family interventions, including functional family therapy. Youth whose families received family therapy, for example, were half as likely to be re-arrested as the youths whose families did not receive family therapy. Unfortunately, instead of investing in commonsense program such as this, H.R. 1279 adopts a 'lock 'em up and throw away the key' strategy to deal with the problem.

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[48] 529 U.S. 598 (2000).
[49] 514 U.S. 549 (1995).

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